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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 685

WEST VIRGINIA POWER COMPANY, a corporation, and NORFOLK & WESTERN RAILWAY COMPANY, a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAYMOND T. JACKSON,
Cleveland, Ohio;

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IN THE

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OCTOBER TERM 1941.

No. .....

WEST VIRGINIA POWER COMPANY, a Corporation, and
NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

West Virginia Power Company and Norfolk & Western Railway Company respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit reversing a final order of the United States District Court for the Southern District of West Virginia, which had sustained petitioners' demurrer to, and dismissed, the petition of respondent for the condemnation of certain lands in Summers County, West Virginia, for use in the execution of a Statutory Scheme known as the Bluestone Reservoir Project.

A. Summary Statement of the Matter Involved.

1. *History and Definitive Character of Statutory Scheme Known as the Bluestone Reservoir Project.* The Statutory Scheme known as the Bluestone Reservoir Project is defined by House Document No. 91, 74th Congress, 1st Session, which was transmitted to the Congress on January 29, 1935 (R. 20-1).* In the reports contained in that document, the Corps of Engineers considered two plans for the Bluestone site on New River just above Hinton, West Virginia, which plans were respectively denominated Plan (a) and Plan (b) (H. D. 91, pp. 118-9, par. 72; pp. 93-4, par. 4).

Plan (a) provided for the utilization of the entire Bluestone site to the maximum practical elevation (1520 feet above sea-level) for the construction of a flood-control project. This project would provide flood storage of 625,600 acre-feet with *annual flood benefits of $740,000* at an estimated cost of $9,466,340, *but would create no water power* (H. D. 91, p. 118, par. 72(a); pp. 93-4, par. 4). This flood storage would not be sufficient to control the maximum flood of record (H. D. 91, p. 95, par. 8; p. 118, pars. 70-71).

Plan (b) provided for the utilization of the Bluestone site up to elevation 1490 for the construction of a power project, with storage for power purposes of 390,100 acre-feet† and the necessary power house and appurtenances which would produce power estimated to yield an annual

* The certified copy of the record herein has been filed with the Clerk of this Court. By stipulation (R. 82-3), for the purposes of this petition the printed record consists of (1) the "Appendix to Brief for the United States" before the Court of Appeals and (2) a printed copy of the proceedings had before that Court. The latter has been inserted at the end of, and under the original cover with, said Appendix.

A copy of H. D. 91 accompanies the record.

† This comprises dead storage in the amount of about 128,000 acre-feet, the balance being power storage.

revenue of approximately $940,000. Under Plan (b), the remaining usable part of the site, viz., that part between elevations 1490 and 1520, was to be utilized by constructing —on top of the power project—a relatively small flood-control reservoir with *only 235,000 acre-feet of flood storage and* estimated annual *flood benefits of only $370,000* (H. D. 91, p. 119, par. 72(b); p. 94, par. 4; p. 115, par. 62). The combined cost of the power project and the flood-control project, to be constructed at the Bluestone site under Plan (b), was estimated at $12,942,390 (H. D. 91, p. 119, par. 72(b)).

Plan (b) was recommended by the District Engineer, the Division Engineer and the Mississippi River Commission and *conditionally* recommended by the Board of Engineers and the Chief of Engineers, in each case with the inclusion of the power project as an independent and primary purpose. These recommendations are unvarying in their designation of the power project or development as a separate and independent purpose and element of Plan (b). Each of the foregoing authorities recommended Plan (b) in preference to Plan (a) even though Plan (b) diverted the larger part of the site to the power project at the expense of flood-control and flood-benefits and did so solely because of the anticipated profits from the power project (H. D. 91, p. 5, par. 16; p. 9, par. 14; p. 95, par. 11; p. 96; p. 120, par. 75). Thus, the Division Engineer, while noting that Plan (b) would greatly reduce flood-storage capacity, would greatly reduce flood-control benefits and would greatly increase the cost in comparison with Plan (a), concluded that Plan (b) "appears the most attractive" because of the large revenues anticipated from the power project included in that plan (H. D. 91, pp. 93-95, particularly par. 8).

With reference to streams in the Kanawha Basin (including New River), the Army Engineers stated:

> "The silt content of the streams is small and causes no appreciable detriment to uses of the water for navigation, water supply or other purpose." (H. D. 91, p. 34, par. 37).

Apart from any beneficial effects accruing to navigation from the flood-control project included in Plan (b), as distinguished from the power project included therein, the reports of the Army Engineers disclose that the Statutory Scheme will be of no benefit to navigation (H. D. 306, 74th Cong., 1st Sess., p. 80, Table 19; p. 94, Table 27; p. 183, Table 53).*

However, both the Chief of Engineers (his being the final and controlling recommendation) and the Board of Engineers conditioned their recommendation of Plan (b) by the following proviso:

> "* * * *provided that* definite agreement is entered into before construction is begun for the disposal of the power at prices and under conditions that in the opinion of the Secretary of War will fully protect the public interest." (H. D. 91, p. 5, par. 16; p. 9, par. 14).†

(For the complete text of the recommendation of the Chief of Engineers see R. 71.)

2. *The Terms and Conditions of the Purported Authorization of the Statutory Scheme Known as the Bluestone Reservoir Project.* By Executive Order No. 7183A, issued September 12, 1935, under authority allegedly vested in the President by the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935, the President purportedly authorized the construction of a project, to be known as the Bluestone Reservoir Project,

* A copy of H. D. 306 accompanies the record certified to this Court.

† Unless otherwise indicated, all italics herein are supplied.

"in accordance with the Report of the Chief of Engineers to the Congress* *and* the plans and specifications submitted therewith" (R. 72).

On June 22, 1936 Congress passed a Flood Control Act (49 Stat. 1570, 1572, 1576), the authorization provisions of which contain the following:

> "OHIO RIVER BASIN
>
> * * * * * * *
>
> "Reservoir system for the reduction of Ohio River floods below Pittsburgh: Construction of reservoirs including the completion of the Bluestone Reservoir now under way, which together with the reservoirs for Pittsburgh flood control, constitutes a comprehensive plan for flood control on the main stream of the Ohio River and on the tributary stream below the reservoirs, as set forth in House Document Numbered 306, Seventy-fourth Congress, first session; estimated construction cost, $19,616,800; estimated cost of lands and damages, $10,519,600."

This Act, it should be noted, did not authorize the so-called Bluestone Reservoir Project in accordance with any plans and specifications in H. D. 306. Indeed, no plans or specifications for that project were contained in or accompanied that report. On the contrary, in H. D. 306 the Chief of Engineers stated:

> "The construction of this reservoir (Bluestone) * * * has been recommended in the comprehensive report on the Kanawha River (H. Doc. No. 91, 74th Cong., 1st Sess.), *provided that a definite agreement can be entered into for the disposal of the power at prices* which will protect the public interest." (H. D. 306, p. 4, par. 13.)

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* Neither the Executive Order nor the petition in the prior or present condemnation proceedings (see pp. 6-8, *infra*) identified this report as H. D. 91, 74th Congress, 1st Session; but the Bill of Particulars in this case so identifies it (R. 20-1).

It is thus clear that the reference to the Bluestone Reservoir Project in the Act of June 22, 1936, was upon the assumption that such project was then "under way" by virtue of prior authorization under the Executive Order and that the authorization, if any, of the project by that Act was by way of ratification of the Executive Order, as was held in *United States* v. *West Virginia Power Co.*, 91 F. (2d) 611, 614.

Before any effective action had been taken under such authority, if any, as was granted by the Act of June 22, 1936, the Flood Control Act of June 28, 1938 was passed. The authorizations thereunder included:

> "OHIO RIVER BASIN
>
> "The general comprehensive plan for flood control and other purposes in the Ohio River Basin * * * : *Provided further*, That the *provisions* of Executive Order Numbered 7183A, dated September 12, 1935, *are approved*, and the acquisition at the cost of the United States of all lands, easements, and rights-of-way needed for the Bluestone Reservoir project are hereby authorized: * * *"

3. *Prior Litigation.* On April 2, 1936, respondent filed a petition for condemnation of lands for the construction of the so-called Bluestone Reservoir Project under the alleged authority of the aforesaid Executive Order No. 7183A. Neither the petition nor the Executive Order identified the Report of the Chief of Engineers which was relied upon in both, and neither disclosed the condition imposed by the Chief of Engineers upon his recommendation in that Report for construction of the project. Petitioner, West Virginia Power Company, demurred upon the sole ground that the Acts relied upon as authority for the issuance of the Executive Order were, if held applicable to the authorization of such projects, unconstitutional delega-

tions of legislative power. The District Court sustained the demurrer and dismissed the petition. On appeal, this order was reversed upon the ground that the intervening Act of June 22, 1936 had ratified the Executive Order. 91 F. (2d) 611, 614. While a petition for certiorari was pending, respondent dismissed its condemnation petition in the District Court over the objection and exception of petitioner, West Virginia Power Company. Thereafter the petition for certiorari was dismissed because the questions raised had thus been rendered moot. 302 U. S. 770-1.*

4. *The Present Action.* On June 26, 1939, respondent filed the present action. After the District Court, upon motion of petitioners, had required the respondent to identify the Report of the Chief of Engineers referred to in the Executive Order and in the petition, and after respondent had amended its petition in response to a ruling of the District Court on an earlier demurrer, petitioners demurred to the petition as amended, the principal grounds being: (1) that the amended petition failed to show any authority in any federal officer to institute and maintain the proceeding, in that the petition failed to allege the prior execution of any definite agreement for the disposal of the power to be created, as required by the terms of the purported authorization; (2) that the purported authorization of the Statutory Scheme is in excess of the constitutional authority of respondent (R. 45-7, 51). The District

* As to the irrelevant and wholly unfounded remarks of the court below (R. 71), regarding counsel's failure to raise the question of condition precedent in the prior condemnation proceeding, all counsel for petitioner, West Virginia Power Company, in that proceeding were of the opinion that the proviso in the report of the Chief of Engineers (H. D. 91, p. 5), requiring a definite agreement for the disposal of the power, constituted a condition precedent to the right to condemn land for the project, but believed that under the state of the pleadings the point could be raised only by answer, not by demurrer.

Court sustained the first ground of demurrer, but overruled the second ground upon what he conceived to be the authority of *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, and *Oklahoma* v. *Atkinson Co.*, 312 U. S. ...., 61 Sup. Ct. 1050, 85 L. Ed. 977 (R. 62). Since respondent did not desire to plead further, the District Court entered a final order dismissing the petition.

On appeal, the Court of Appeals for the Fourth Circuit reversed the District Court upon the grounds: (1) that the condition imposed by the Chief of Engineers upon his recommendation for the construction of the project was not adopted by the Executive Order and consequently was not adopted by the Congress in the Act of June 28, 1938; (2) that, even though the Congress had adopted the condition in the Act of June 28, 1938, nevertheless, in the absence of express language of revocation, the supposedly unconditional authorization of the project in the Act of June 22, 1936 would continue in full force and effect; and (3) that the question of constitutional authority to authorize the power project included in the Bluestone Statutory Scheme was concluded by the decision of this Court in *Oklahoma* v. *Atkinson Co.*, 312 U. S. ....., 61 S. Ct. 1050, 85 L. Ed. 977 (R. 69-79).

B. Jurisdiction.

The order of the Circuit Court of Appeals was entered on September 17, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; 28 U. S. C. 347.

C. Questions Presented.

1. Whether congressional authorization of a project "in accordance with the Report of the Chief of Engineers to the Congress *and* the plans and specifications submitted

therewith" (Exec. Order 7183A, the provisions of which were approved by the Act of June 28, 1938) conditions the authority granted to the federal officers upon the occurrence or performance of an express condition imposed by the Chief of Engineers upon his recommendation of the project and without which the project does not have his recommendation (H. D. 91, p. 5).

2. Whether the Congress has constitutional authority to authorize the construction and operation of the power project included in the Statutory Scheme known as the Bluestone Reservoir Project, purportedly authorized by the Act of Congress of June 28, 1938.

D. Reasons Relied Upon for Allowance of the Writ.

1. The court below held that the condition imposed by the Chief of Engineers upon his recommendation for the construction of the project (H. D. 91, p. 5) was not adopted by Executive Order No. 7183A authorizing the construction of the project "in accordance with the report of the Chief of Engineers to the Congress [H. D. 91, p. 5] *and* the plans and specifications submitted therewith" and was not adopted by the Congress in the Act of June 28, 1938 (52 Stat. 1215, 1217) approving the provisions of the Executive Order (R. 70-75). In other words, the court below held that an authorization in accordance both with a report and with the plans was only an authorization in accordance with the plans and that the authorization in accordance with the report was meaningless. In so holding, the court below decided an important question of federal law which has not been, but should be, decided by this Court. With congressional authorization of many projects all over the country involving the expenditure of hundreds of millions of dollars, the question of whether or not federal officers,

under the terms of authorizations of this character, must comply with all, none or only part of the conditions contained in the report of the Chief of Engineers and imposed by him upon his recommendation for the construction of a project (in accordance with which report alone the federal officers are authorized to construct the project), is a highly important question of federal law. The decision of the lower court on this point is probably in conflict with the decision of this Court in *United States* v. *Arizona*, 295 U. S. 174, 189, but if not, then this is an important question of federal law which has not been, but should be, decided by this Court.

1a. Moreover, in so holding, the decision of the lower court is probably in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Ryan* v. *Chicago B. & Q. R. R.*, 59 F. (2d) 137, 143.

2. The court below apparently held that even though the Congress, by its approval of the provisions of the Executive Order by the Act of June 28, 1938, had adopted the condition imposed upon the construction of the project by the Chief of Engineers in his report, nevertheless, in the absence of express language of revocation, the supposedly unconditional authorization of the project in the Act of June 22, 1936 would remain in full force and effect (R. 74). The decision of the lower court in this respect is in plain conflict with applicable decisions of this Court holding that, when a later statute conflicts with an earlier statute, the earlier statute is repealed to the extent of the conflict. *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *United States* v. *Tynen*, 11 Wall. 88, 92; *Fisk* v. *Henarie*, 142 U. S. 459, 467; *District of Columbia* v. *Hutton*, 143 U. S. 18, 26.

3. The court below, ignoring the undisputed facts in the instant case, held in substance (R. 77-9) that, so long as the Congress in the same statute also authorizes a flood-control project at the same site, the Congress has constitutional authority to authorize a power project to create water power for sale to the public, without regard to whether the water power will come "into being in the operation of works constructed in the exercise of some power delegated to the United States". *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 340. In so holding, the lower court misconstrued and misapplied the decision of this Court in *Oklahoma* v. *Atkinson Co.*, 312 U. S. ....., 61 Sup. Ct. 1050, 85 L. Ed. 977, and decided a question of federal law in conflict with the decisions of this Court in *Oklahoma* v. *Atkinson Co., supra; United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 426; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 340; *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254, 273, 275; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 419; *Wisconsin* v. *Illinois*, 278 U. S. 367, 417.

In the *Atkinson* case the question was whether the creation of the dead storage and of the storage for the regulation of low-water flow, which would necessarily create water power, were related to the constitutional functions of (a) navigation improvement or (b) providing flood protection. Under the unique conditions existing in the *Atkinson* case with respect to insufficiency of low-water flow and to silting and to their effect upon navigation and flood control on the Red River, it was established that the provision of dead storage and of storage for the regulation of low-water flow were necessary and appropriate for providing flood control and the improvement of navigation on the Red River quite

apart from the fact that they would also create water power. This was due to the fact that, owing to the location of the Red River in an arid region where extremely heavy silting and inadequate flows are characteristic of the streams, the regulation and enrichment of low-water flow was necessary for navigation below and provision for silt accumulation was necessary both for such navigation and for flood control.

Under the undisputed facts in the instant case, however, the dead storage and power storage are created solely for the development of power. Neither is in aid of, but each is at the expense of, flood-control, and neither has any beneficial effect upon navigation. (See pp. 24-32, *infra*.)

The lower court, evidently considering only the superficial resemblance in nomenclature and plainly disregarding the circumstance that the instant case presents a totally different situation from that in the *Atkinson* case with respect to these constitutional facts, held that the *Atkinson* case was controlling—and did so despite the fact that the decision of this Court in the *Atkinson* case was based upon a state of facts precisely opposite to that before the Court in the instant case.

4. The court below held that it is for Congress to decide to what extent the utilization of available sites for flood-control shall be sacrificed to their utilization for the creation of water power, so as to make the flood-control project economically feasible (R. 77). In so holding, the lower court again misconstrues and misapplies the decision of this Court in the *Atkinson* case. Congress may decide to what extent it will refrain from appropriating for flood control a site which is also suitable for power development, just as it may determine to what extent it will refrain from utilizing lands for flood control at the expense of their utilization for

agriculture. But under the decisions of this Court that circumstance no more establishes constitutional authority for the government to construct a power project than it does to engage in agriculture for the sale of farm products for profit.

4a. Moreover, to the extent that this is a holding that Congress, in addition to its power to raise money by taxation or borrowing, may engage in a business enterprise in order to produce income with which to carry out other objectives even if clearly constitutional, the decision is probably in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Certain Lands in the City of Louisville,* 78 F. (2d) 684, 688, and in any event presents an important question of federal law which has not been, but should be, decided by this Court.

4b. The decision of the court below on this point is also in conflict with *The License Tax Cases,* 5 Wall. 462, 471, holding that the government may not engage in a business in order to tax it.

4c. The decision of the court below on this point, insofar as it upholds the power of the government to condemn lands for such a business enterprise, further is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Cincinnati* v. *Vester,* 33 F. (2d) 242, 244-5, (affirmed on other grounds 281 U. S. 439) holding that condemnation of lands for the purpose of engaging in business and making a profit is a taking for a private purpose and a denial of due process of law.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the

United States Circuit Court of Appeals for the Fourth Circuit should be granted.

WEST VIRGINIA POWER COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY

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Dated: October 6, 1941.